CORRECTED COPY

P. 6, 15

Supreme Court, U. S.
FILED
OCT 19 1977
MICHAEL RODAK, JR., CLERK

No. 76-1500

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
M. CARR FERGUSON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
ANN BELANGER DURNEY,
GILBERT S. ROTHENBERG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument	7
The federal excise tax upon the use of civil aircraft is constitutional as applied to aircraft owned by the states and used for official purposes	7
A. The federal civil aircraft use tax is a charge for the use of airports and airways	7
B. The decisions of this Court establish that a user charge for facilities provided or services rendered is not subject to the constitutional restrictions applicable to taxes	14
Conclusion	26
Appendix	27

CITATIONS

Cases:	
Aero Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U.S. 495	6, 13, 17
Aero Mayflower Transit Co. v. *Georgia Public Service Commission*, 295 U.S. 285	13, 18

Cases—Continued

Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 ---------- 5, 6, 13–14, 17, 18, 20
City of New York v. *United States*, 394 F. Supp. 641, affirmed, 538 F. 2d 308, certiorari denied, 429 U.S. 825---------- 3, 21–22
Clark v. *Poor*, 274 U.S. 554---------- 18
Clyde Mallory Lines v. *Alabama ex rel. State Dock Commission*, 296 U.S. 261--- 6, 16
Collector, The v. *Day*, 11 Wall. 113------- 22
Continental Baking Co. v. *Woodring*, 286 U.S. 352---------- 18
Evansville Airport v. *Delta Airlines*, 405 U.S. 707---------- 6, 18–20
Federal Power Commission v. *New England Power Co.*, 415 U.S. 345---------- 15
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466---------- 22
Head Money Cases, 112 U.S. 580----- 6, 15–16, 17
Helvering v. *Gerhardt*, 304 U.S. 405------ 22
Hendrick v. *Maryland*, 235 U.S. 610------ 6, 18
Hicklin v. *Coney*, 290 U.S. 169---------- 18
Huse v. *Glover*, 119 U.S. 543---------- 6, 16
Interstate Busses Corp. v. *Blodgett*, 276 U.S. 245---------- 18
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275---------- 24
Kane v. *New Jersey*, 242 U.S. 160-------- 18
McCarroll v. *Dixie Lines*, 309 U.S. 176---- 18
McCulloch v. *Maryland*, 4 Wheat. 316---- 22
Minnesota Rate Cases, The, 230 U.S. 352- 6, 16
Morf v. *Bingaman*, 298 U.S. 407--------- 13
National Cable Television Assn. v. *United States*, 415 U.S. 336---------- 15

Cases—Continued

National League of Cities v. *Usery*, 426 U.S. 833---------- 23, 25
NewYork v. *United States*, 326 U.S. 572-- 22–23
Ohio v. *Helvering*, 292 U.S. 360---------- 22
Oklahoma v. *Civil Service Commission*, 330 U.S. 127---------- 24
Packet Co. v. *Keokuk*, 95 U.S. 80------- 6, 16, 17
Packet Co. v. *St. Louis*, 100 U.S. 423----- 6, 16
South Carolina v. *United States*, 199 U.S. 437 ---------- 22
State of California v. *United States*, 77-2 U.S.T.C. ¶16,266, decided May 31, 1977 (E.D. Cal.)---------- 22
State of Georgia v. *United States*, 430 F. Supp. 823, appeal pending (No. 77-16)- 7, 25
State of Texas v. *United States*, 72-2 U.S.T.C. ¶16,048, decided July 11, 1972 (W.D. Tex.) affirmed *per curiam*, 73-1 U.S.T.C. ¶16,085, decided December 4, 1972 (C.A. 5)---------- 4, 12, 21
United States v. *San Francisco*, 310 U.S. 16 ---------- 24

Constitution, statutes, and regulations:

United States Constitution:
Article I, Section 8---------- 16
Article I, Section 10, clause 3------- 5–6, 16
Article VI---------- 22
Act of August 3, 1882, Section 1, 22 Stat. 214 ---------- 16
Airport and Airway Development Act of 1970, 84 Stat. 219, *et seq*---------- 7–8, 9
Section 2, 49 U.S.C. 1701---------- 8

Constitution, statutes, and regulations—Con.
Airport and Airway Development Act Amendments of 1976, Pub. L. 94–353, 90 Stat. 871, *et seq.*:
Section 6 ---- 19–20
Section 6(d), (e) ---- 20
Airport and Airway Revenue Act, 84 Stat. 236, *et seq.*:
Section 202 ---- 8, 14–15
Section 203 ---- 8
Section 204 ---- 8
Section 206 ---- 8
Section 208, 49 U.S.C. 1742 ---- 11
Section 208(f)(1)(A) and (B), 49 U.S.C. 1742(f)(1)(A) and (B) ---- 12, 19–20
Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq* ---- 12
Section 307, 49 U.S.C. 1348 ---- 12
Section 307, 49 U.S.C. 1348(b) ---- 20
Section 501(a), 49 U.S.C. 1401(a) ---- 2
Internal Revenue Code of 1954 (26 U.S.C.):
Section 4041 ---- 8
Section 4261 ---- 8, 10, 21
Section 4271 ---- 8, 21
Section 4491 ---- 2, 4, 5, 7, 8, 9, 13, 27
Section 4491(a) ---- 2, 27
Section 4492 ---- 2, 8, 28
Section 4492(a)(1) ---- 3, 28
Section 4492(c)(2) ---- 9, 29
Pub. L. 92–174, 85 Stat. 491–492 ---- 19
49 U.S.C. 1655(c) ---- 20

Constitution, statutes, and regulations—Con.
Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.):
Section 154.3–1 ---- 2, 29
Section 154.3–1(b)(1) ---- 9, 30
Section 154.3–1(b)(2) ---- 3, 9, 30
Miscellaneous:
114 Cong. Rec. 8987 (1968) ---- 10
Hearings on Administration's Proposal on Aviation User Charges before the House Committee on Ways and Means, 91st Cong., 1st Sess. (1969) ---- 10
H.R. Rep. No. 91–601, 91st Cong., 1st Sess. (1969) ---- 3, 5, 8, 9, 10, 11, 12, 14
H.R. Rep. No. 94–594, 94th Cong., 1st Sess. (1975) ---- 10, 20
McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485 (1973) ---- 23
Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3 (1950) ---- 23
Second Annual Report of Operations under the Airport and Airway Development Act, Department of Transportation (1971) ---- 20
S. Rep. No. 91–706, 91st Cong., 2d Sess. (1970) ---- 8, 10, 11, 14
United States Department of Transportation, Airport and Airway Cost Allocation Study (1973) ---- 13

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion and written order of the district court (Pet. App. A-1 to A-4) are not reported. The opinion of the court of appeals (Pet. App. A-5 to A-10) is reported at 548 F. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1977 (Pet. App. A-11). The petition for a writ of certiorari was filed on April 28, 1977, and was granted on June 20, 1977 (A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal excise tax upon the use of civil aircraft is constitutional as applied to aircraft owned by the states and used for official purposes.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 4491 and 4492 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Section 154.3–1 of the Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 27–30.

STATEMENT

In 1969, petitioner Commonwealth of Massachusetts purchased a helicopter for use by its state police. Pursuant to Section 501(a) of the Federal Aviation Act of 1958, 72 Stat. 771, 49 U.S.C. 1401(a), petitioner registered the helicopter with the Federal Aviation Administration, for use in promoting highway safety. In performing that function, the helicopter serves as an airborne command post and provides transportation in medical emergencies. On occasion, petitioner's state police also use the helicopter to search for criminal suspects and escapees from correctional facilities (Complaint, A. 7–8).

Pursuant to 26 U.S.C. 4491, an annual excise tax is imposed upon the use of taxable civil aircraft in the navigable airspace of the United States.[1] The term

[1] The annual rate of tax is $25, plus 2 cents per pound of takeoff weight in excess of 2,500 pounds for nonturbine-powered aircraft, and 3½ cents per pound of takeoff weight for turbine-powered aircraft (see 26 U.S.C. 4491(a)).

"taxable civil aircraft" includes any engine-driven aircraft "registered, or required to be registered under section 501(a) of the Federal Aviation Act of 1958" (26 U.S.C. 4492(a)(1)). Section 154.3–1(b)(2) of the Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.) defines "taxable civil aircraft" to include "civil aircraft owned by the United States and State and local governments"[2] (Appendix, *infra,* p. 30).

For its taxable year ended June 30, 1971, petitioner paid $131.43 (plus interest and penalties) in federal aircraft use taxes. Petitioner thereafter sought a refund of these taxes, which was denied (Pet. App. A–5; Ex. E, A. 18–19).

In this refund suit brought by petitioner in the United States District Court for the District of Massachusetts, the district court upheld the constitutionality of the tax as applied to aircraft owned by the states as a valid user charge. In the district court's view, the tax was a user charge because the proceeds of the tax are allocated to a special trust fund used exclusively for the expansion and improvement of airports and the airway system throughout the Nation (Pet. App. A–2).[3]

The court of appeals affirmed (Pet. App. A–5 to A–10). It stated: "We view * * * [the tax] as 'a

[2] Military aircraft are exempt from the tax. See Temporary Regulations, Section 154.3–1(b)(2); H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 48–49 (1969).

[3] On the authority of *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y.), affirmed, 538 F. 2d 308 (C.A. 2), certiorari denied, 429 U.S. 825, the district court also rejected petitioner's claim that the states are constitutionally immune from federal taxation (Pet. App. A–2).

charge for services rendered [which] represents a quid pro quo, and [which] as such, is outside the scope of the doctrine of implied intergovernmental tax immunity.' *Texas* v. *United States,* 72–2 U.S. Tax Cas. ¶ 16.04[8] (W.D. Tex. 1972), aff'd, 73–1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973)" (Pet. App. A–7). The court concluded that "'[n]othing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. * * * No logical reason exists why all users of the air transportation system should not pay their fair share of such costs'" (Pe.. App. A–10, quoting from *State of Texas* v. *United States,* 72–2 U.S.T.C. ¶ 16,048, p. 86,131, decided July 11, 1972 (W.D. Tex.), affirmed *per curiam,* 73–1 U.S. T.C. ¶ 16,085, decided December 4, 1972 (C.A. 5)).

SUMMARY OF ARGUMENT

A.

The court of appeals correctly upheld the constitutionality of the federal civil aircraft use tax as applied to aircraft owned by the states and used for official purposes.

The statute in question—Section 4491 of the Internal Revenue Code—was enacted as part of the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970. These Acts pro-

vide for substantial expansion and improvement of the airport and airway system to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 1 (1969)), including an annual excise tax imposed upon the use of taxable civil aircraft under Section 4491.

Contrary to petitioner's argument, the aircraft use tax is a user charge. Both the language of the statute and the pertinent legislative history show that the levy was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system" (H.R. Rep. No. 91–601, *supra,* at 40). Petitioner's contention that the tax is not a user charge because it is not directly correlated to the frequency of use was rejected almost 30 years ago in *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542.

B.

Since the aircraft use tax is a user charge, petitioner's further argument that it is constitutionally immune from federal taxation must likewise fail. There is a fundamental difference between a tax that is designed to produce revenue to support general governmental activities, and a user charge which is designed to recoup part of the cost of governmental facilities and services directly from those who benefit from them. In substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article

I, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g., Clyde Mallory Lines* v. *Alabama ex rel. State Dock Commission,* 296 U.S. 261; *Huse* v. *Glover,* 119 U.S. 543; *Packet Co.* v. *St. Louis,* 100 U.S. 423; *Packet Co.* v. *Keokuk,* 95 U.S. 80, 84. Cf. *The Minnesota Rate Cases,* 230 U.S. 352, 405. See also *Head Money Cases,* 112 U.S. 580, 595–596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state. See, *e.g., Capitol Greyhound Lines* v. *Brice, supra*; *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners,* 332 U.S. 495; *Hendrick* v. *Maryland,* 235 U.S. 610.

Finally, the Court has sustained state and local enplaning charges upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines,* 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate commerce, they impermissibly interfered with that commerce. As the Court stated in *Hendrick* v. *Maryland, supra,* 235 U.S. at 623–624, "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

Accordingly, this case presents no occasion to consider the present status of the doctrine of implied constitutional immunity of the states from federal taxation. Here, the annual excise tax on the use of

civil aircraft is not a tax subject to any constitutional restrictions but is simply a required payment by the user for airport and airway facilities funded or provided by the federal government. Petitioner can no more claim the right to free use of these facilities than it could, for example, use the postal service without purchasing stamps.

Nor does the tax interfere with the exercise of any of the sovereign functions of the states. By imposing this user charge, Congress sought to require that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining essential airport and airway facilities.

ARGUMENT

THE FEDERAL EXCISE TAX UPON THE USE OF CIVIL AIRCRAFT IS CONSTITUTIONAL AS APPLIED TO AIRCRAFT OWNED BY THE STATES AND USED FOR OFFICIAL PURPOSES

A. THE FEDERAL CIVIL AIRCRAFT USE TAX IS A CHARGE FOR THE USE OF AIRPORTS AND AIRWAYS

1. This case presents a constitutional challenge by the Commonwealth of Massachusetts to a federal tax statute enacted as an integral part of a comprehensive program to improve the Nation's air transportation system.[4] The provision in question—Section 4491 of the Internal Revenue Code—was enacted as part of the Airport and Airway Development and Reve-

[4] The question is also presented in *State of Georgia* v. *United States,* 430 F. Supp. 823 (N.D. Ga.), pending on the government's appeal to this Court (No. 77-16).

nue Acts of 1970, 84 Stat. 219, 236, which Congress passed upon finding "[t]hat the Nation's airport and airway system * * * [was] inadequate to meet the current and projected growth in aviation" and "[t]hat substantial expansion and improvement of the airport and airway system * * * [was] required to meet the demands of interstate commerce, the postal service, and national defense."[5]

The statute, in two Titles, provided for substantial expansion and improvement of the airport and airway system, to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 1 (1969)), including an annual registration (*i.e.*, excise) tax imposed upon the use of taxable civil aircraft under Section 4491 of the Internal Revenue Code. See H.R. Rep. No. 91–601, *supra*, at 38; S. Rep. No. 91–706, 91st Cong., 2d Sess. 5 (1970).[6] Section

[5] See Section 2 of the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. 1701.

[6] The Airport and Airway Revenue Act increased two existing user charges and added two user charges: (1) Section 202 of the Act amended Section 4041 of the Internal Revenue Code by increasing the gasoline tax on noncommercial general aviation; (2) Section 203 amended Section 4261 of the Code by increasing the air passenger ticket tax for domestic flights from five to eight percent and adding a $3 "head tax" on international flights originating in the United States; (3) Section 204 added Section 4271 to the Code, which imposed a five percent user tax on the transportation of property by air; and (4) Section 206 added Section 4491 to the 1954 Code (the tax at issue here), which provided for annual registration taxes in accordance with the weight and type of aircraft involved.

4492 of the Code defines the term "taxable civil aircraft" to include any engine-driven aircraft "registered, or required to be registered under section 501 (a) of the Federal Aviation Act of 1958." Under Section 154.3–1(b)(2) of the Temporary Regulations issued under the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.), "taxable civil aircraft" includes "civil aircraft owned by the United States and State and local governments" (Appendix, *infra*, p. 30). See H.R. Rep. No. 91–601, *supra*, at 48–49.

The language of the statute shows that Congress viewed the aircraft registration tax as a user charge. Section 4491(a) speaks of a tax "on the use of any taxable civil aircraft * * *." Section 4492(c)(2) defines the term "use" as "use in the navigable airspace in the United States." The taxable event under the statute is the use of the airports and airways by an aircraft. Section 154.3–1(b)(1) of the Temporary Regulations confirms this understanding by providing that "[m]ere possession of a civil aircraft does not constitute 'use.'"[7] Thus, the tax under Section 4491 is analogous to the variety of charges imposed by airports upon airplanes for landing rights, terminal use, and other privileges incident to the use of the airport and airway system.

The legislative history confirms that Congress intended the aircraft registration tax to be a user charge. In describing the purpose of the levies, the

[7] The descriptive title of the statute complements the operative language. It speaks of "An Act * * * for the imposition of airport and airway user charges * * *" (see 84 Stat. 219).

House Ways and Means Committee Report observed that "the civil users of the system should pay an increasing portion of the total Federal Government outlays for the air transportation system." H.R. Rep. No. 91–601, *supra,* at 35.[8] The report also stated that "[i]t appears appropriate to impose some direct *user charge* on air carriers themselves * * * since air carriers presently are not paying a direct user tax with respect to the use of the aviation system" (emphasis added.) The report further described "[t]he aircraft registration fee * * * [as] based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." *Id.* at 40. Thus, Congress withdrew the exemptions that federal, state, and local governments previously had from the companion tax on the transportation of persons by air (26 U.S.C. 4261). As the House Report concluded, "since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." *Id.* at 46. See also 114 Cong. Rec. 8987 (1968).[9]

[8] See also H.R. Rep. No. 91–601, *supra*, at 38; S. Rep. No. 91–706, *supra*, at 2, 5; Statement of John A. Volpe, Secretary of Transportation, Hearings on Administration's Proposal on Aviation User Charges before the House Committee on Ways and Means, 91st Cong., 1st Sess. 35–36 (1969).

[9] The House Committee further stated that "new and increased air user taxes" were necessary to provide additional funding for the expansion and development of an improved airport and airway system. H.R. Rep. No. 91–601, *supra*, at 38. See also S. Rep. No. 91–706, *supra*, at 5; H.R. Rep. No. 94–594, 94th Cong., 1st Sess. 11, 45 (1975).

As part of this comprehensive air transportation legislation, Congress established the Airport and Airway Trust Fund [10] to ensure that the user taxes were expended only for the improvement and maintenance of the air transportation system. This fund is the depository of the proceeds of the various airport and airway user charges from which the air transportation expenditures are made, including the tax here involved. It is the direct link between the Development Act and the excise tax at issue in this case. See H.R. Rep. No. 91–601, *supra*, at 41, 49–50.[11]

The user charges that are paid into the fund are expended for the development of airports, from the planning stages through construction, and for the planning, research, development, operation and main-

[10] See Section 208 of the Airport and Airway Revenue Act of 1970, 49 U.S.C. 1742.

[11] The legislative history specifically refutes petitioner's assertion (Br. 36–37 n. 42) that "there is * * * no direct link made between the use of that system and payment of the tax." See, *e.g.*, H.R. Rep. No. 91–601, *supra*, at 3: "Under this legislation a better future is promised because a trust fund will be established and there will be a direct relationship between the use of the system and the money generated to meet the needs required by the users. It is fitting that the primary financial burden will be assumed by the direct users."

Moreover, it does not matter that these airport and airway user charges will not pay for the entire cost of establishing and maintaining the improved air transportation system. The correctness of the user charge classification does not depend upon a perfect correlation between costs and revenues. It rests solely upon the premise that all persons who make use of the system must pay a fee for that use. See H.R. Rep. No. 91–601, *supra*, at 40; S. Rep. No. 91–706, *supra*, at 8.

248—472—77——3

tenance of air traffic control, air navigation, communications, and supporting services for the airway system (Secs. 208(f)(1)(A) and (B) of the Airport and Airway Revenue Act, 49 U.S.C. 1742(f)(1)(A) and (B)). These latter services, provided almost entirely by the Federal Aviation Administration, are available to all users of the airway system, both public and private alike. The 1970 Acts thus supplement the provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*, under which the Administrator of the Federal Aviation Administration regulates the use of navigable airspace, prescribes air traffic rules, and acquires facilities necessary to insure aircraft safety. See 49 U.S.C. 1348.

2. The foregoing legislative history of the Airport and Airway Development and Revenue Acts confirms the correctness of the court of appeals' conclusion that the federal aircraft use tax is " 'a charge for services rendered [which] represents a quid pro quo' " (Pet. App. A–7, quoting from *State of Texas* v. *United States, supra,* 72–2 U.S.T.C. at 86,131). The charges are based upon the congressional judgment that the cost of maintaining and developing the air transportation system should be borne to some extent by the direct users of that system, in much the same way that the cost of toll roads is borne by those who use such roads (see H.R. Rep. No. 91–601, *supra,* at 38, 48).

Contrary to petitioner's argument (Br. 28–41), the aircraft use tax is a user charge despite the fact that it is not computed on the exact amount of use by each

aircraft.[12] In *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, the Court rejected exactly the same contention. There, the Court sustained a Maryland highway toll of "2% upon the fair market value of motor vehicles used in interstate commerce" (*id.* at 543, 546).[13] Like petitioner, the carrier argued that the correlation between the tax and use was not precise enough to uphold the toll as a valid user charge. But the Court concluded that the "tax * * * should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted" (*id.* at 545). Cf. 339 U.S. at 548 (Frankfurter, J., dissenting).[14] The Court's further

[12] Petitioner also argues (Br. 38–40) that the Airport and Airway Cost Allocation Study of the United States Department of Transportation (1973) supports its position that the charges imposed by Section 4491 are not true user fees. However, the Study is precisely to the contrary (pp. 10–11, 43, 50, 56). It reflects the user fee character of the present system, and points out (p. 43) that even after the 1970 Act, approximately one-half of the federal costs are paid from general tax revenues. Indeed, the Study recommends (pp. 51–62) that users be required to pay a greater share of the costs of the system and that payments increase in accordance with greater use.

[13] The Court had earlier held that a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, as long as the fee was not excessive. See, *e.g.*, *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285; *Morf* v. *Bingaman*, 298 U.S. 407; *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495. See also p. 18 n. 17, *infra.*

[14] The Maryland tax in *Capitol Greyhound Lines* also imposed a mileage charge upon the interstate carriers in addition to the two percent tax, so as to require heavy road users to bear more of the costs of maintaining roads. Here, too, Section 202 of the Air-

statement (*id.* at 546–547) forecloses petitioner's contention that the tax at issue is not a user charge:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with "rough approximation rather than precision." *Harvester Co.* v. *Evatt,* 329 U.S. 416, 422–423. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U.S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads. [Footnote omitted.]

B. THE DECISIONS OF THIS COURT ESTABLISH THAT A USER CHARGE FOR FACILITIES PROVIDED OR SERVICES RENDERED IS NOT SUBJECT TO THE CONSTITUTIONAL RESTRICTIONS APPLICABLE TO TAXES

1. Petitioner claims that even if the tax at issue is a true user charge, it is barred by the implied constitutional immunity of the states from federal taxation.

port and Airway Revenue Act of 1970 also increased the fuel tax on noncommercial general aviation in order to tax heavy users more. See S. Rep. No. 91–706, *supra*, at 7–8; H.R. Rep. No. 91–601, *supra*, at 39–40.

But this Court has long held that there is a fundamental difference between a tax that is enacted to support general governmental activities, and a user charge that is designed to recoup part of the cost of providing particular governmental facilities and services directly from those who benefit from them.[15]

In substantially analogous cases, the Court has upheld the constitutionality of taxes constituting fees for services rendered by the United States and by state and local governments. In the *Head Money Cases,* 112 U.S. 580, the owners of ships transporting immigrant passengers to the United States were subjected to a federal tax of 50 cents per passenger. In up-

[15] Petitioner further argues (Br. 35–37) that the validity of all user charges imposed by the federal government should be tested under the standards of *National Cable Television Assn.* v. *United States*, 415 U.S. 336, and *Federal Power Commission* v. *New England Power Co.*, 415 U.S 345. The Court there characterized a user charge as a fee for a "measurable unit or amount of Government service or property from which * * * [a recipient] derives a special benefit" (415 U.S. at 349).

But the Court did not hold that user fees could be imposed by Congress only at a level commensurate with the measurable use by the recipient. To the contrary, the Court concluded that under the congressional delegations of authority to the licensing agencies involved, the license fees must be geared to the costs directly incurred by the agency in establishing and administering the licensing procedures. Indeed, petitioner acknowledges (Br. 37) that in *National Cable* and *New England Power Co.*, the limitation was on the "federal agencies' authority to impose charges" and was deemed necessary "to prevent dilution of the basic constitutional precept that the legislative branch alone may levy taxes" (see also Pet. Br. 35 n. 39). Here, on the other hand, the user charge is imposed by an Act of Congress and not an administrative agency.

holding the tax against the claim that it was not levied to provide for the common defense and general welfare and was not uniform as required by Article I, Section 8 of the Constitution, the Court observed that the levy was not "strictly speaking, a tax or duty within the meaning of the Constitution" (112 U.S. at 595–596), but rather was a means of regulating foreign commerce. The Court noted that the funds raised "[did] not go to the general support of the government" (*id.* at 596), but constituted a special "immigrant fund," the proceeds of which were used to "defray the expense of regulating immigration * * * [and to provide] for the care of immigrants arriving in the United States" (*id.* at 590; Act of August 3, 1882, Section 1, 22 Stat. 214).

Similarly, in *Packet Co.* v. *Keokuk,* 95 U.S. 80, the Court held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, were not taxes in the traditional sense and therefore did not violate Article I, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." As the Court stated, "a charge for services rendered or for conveniences provided is in no sense a tax or a duty" (*id.* at 84). See also *Packet Co.* v. *St. Louis,* 100 U.S. 423; *Huse* v. *Glover,* 119 U.S. 543; *Clyde Mallory Lines* v. *Alabama ex rel. State Dock Commission,* 296 U.S. 261. Cf. *The Minnesota Rate Cases,* 230 U.S. 352, 405. While petitioner (Br. 25) seeks to dismiss these decisions as historical anachronisms, they stand for a proposition of continuing

validity, *viz,* that particularized charges for the use of services rendered can be imposed despite constitutional limitations on the sovereign's taxing power.

More recently, in *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. 542, the Court upheld a Maryland tax on all common carriers transporting passengers over Maryland roads, against a claim by interstate carriers that the tax violated the Commerce Clause. The tax was two percent of the fair market value of the vehicles and payment was a prerequisite to their operation within the state. The Court pointed out that the "tax applies to interstate and intrastate commerce without discrimination," that the "tax proceeds are used by Maryland wholly for road purposes," and that "the tax was imposed for the privilege of road use" (*id.* at 544).

Similarly, in *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners,* 332 U.S. 495, the Court sustained two Montana taxes of $10 and $15 per vehicle against a claim by an interstate carrier that they violated the Commerce Clause. The Court characterized the taxes as valid user charges (*id.* at 503) that were "exacted 'in consideration of the use of the highways of this state,' that is, they are laid for the privilege of using those highways."[16] The Court

[16] Contrary to petitioner's argument (Br. 30–31), it does not matter that the federal government is not the "proprietor" of the airports or airways. None of the Court's decisions sustaining the constitutionality of user charges has rested on that narrow ground. The critical element in the Court's analysis is that when services are rendered, in whatever capacity, the supplier of those services is entitled to charge a fee, which may take the form of a tax. See, *e.g., Head Money Cases, supra; Packet Co.* v. *Keokuk, supra.*

upheld the Montana user charges, even though they were not allocated to a special trust fund, as is the aircraft use tax, but were commingled with other revenues in the general state treasury.[17]

Finally, in *Evansville Airport* v. *Delta Airlines*, 405 U.S. 707, the Court upheld the constitutionality of closely-analogous state air transportation user charges. There, the state imposed a "use and service charge" of one dollar "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" in Evansville, Indiana (*id.* at 709). Like the aircraft use tax in this case, the state-tax in *Evansville Airport* was imposed upon the users of the airport and supporting services, and the funds collected were separately maintained for the purpose of improving the air transportation system.

[17] The Court has consistently upheld state charges for road use against claims that they violated the Commerce Clause. See, *e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285; *Hicklin* v. *Coney*, 290 U.S. 169; *Continental Baking Co.* v. *Woodring*, 286 U.S. 352; *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245; *Clark* v. *Poor*, 274 U.S. 554; *Kane* v. *New Jersey*, 242 U.S. 160; *Hendrick* v. *Maryland*, 235 U.S. 610. In the latter case, the Court stated that "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor" (235 U.S. at 623–624). But cf. *McCarroll* v. *Dixie Lines*, 309 U.S. 176, where a state gasoline tax imposed on fuel in excess of 20 gallons brought into the state by a vehicle for use by that vehicle was struck down where it was shown to bear no reasonable relationship to road use. There, the taxpayer demonstrated that the gasoline in excess of 20 gallons that was subject to tax was substantially more than it consumed within the state. See 309 U.S. at 180–183, Stone, J., concurring.

In rejecting the airlines' contention that the tax was an unreasonable burden on interstate commerce, the Court reaffirmed that it was "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike" (405 U.S. at 714). The Court concluded that a user charge is constitutional if it is (1) nondiscriminatory; (2) based upon some fair approximation of use or the privilege for use; and (3) not shown to be excessive in comparison with the governmental benefits conferred (*id.* at 716–720).

2. Under the standards in *Evansville Airport* for appraising the constitutionality of user charges, the federal aircraft use tax in this case is valid. First, the tax is nondiscriminatory and petitioner does not contend otherwise. Second, the tax, computed as a flat fee for the privilege of using the air transportation system, is tied to use and is therefore based upon a fair approximation of use or privilege for use.

Finally, the tax is not excessive in comparison with the governmental benefits conferred, which include the funding of airport development and the operation of air traffic control, air navigation, and communications for the national airway system.[18] See Section 208(f)

[18] The authority to use trust fund monies for the "maintenance and operation" of air navigation facilities was temporarily repealed in 1971 on account of administration abuses (see Pub. L. 92–174, 85 Stat. 491–492). However, in 1976, Congress substantially restored that authority (see Section 6 of the Airport and

(1)(A) and (B) of the Airport and Airway Revenue Act of 1970, 49 U.S.C. 1742(f)(1) (A) and (B). The annual base user charge is $25 per aircraft, which is hardly excessive in comparison with the extensive benefits provided. As the Court observed in *Evansville Airport,* "a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive" (405 U.S. at 715). Accord: *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 547. For the taxable year at issue with respect to which petitioner seeks to recover $131.43 in tax in this refund suit, petitioner received more than $1.5 million from the Airport and Airway Trust Fund in planning and development grants. See *Second Annual Report of Operations under the Airport and Airway Development Act,* Department of Transportation, pp. 9, 12–13, 18, 29–30 (1971).

In view of the explicit legislative history characterizing the aircraft use tax as a user charge and the decisions of this Court upholding analogous user

---

Airway Development Act Amendments of 1976, Pub. L. 94–353, 90 Stat. 872). See generally H.R. Rep. No. 94–594, 94th Cong., 1st Sess. 45–46 (1975). Under the 1976 amendments, trust fund monies may be appropriated, within certain dollar limits, for costs assessed against the United States under international agreements relating to the joint financing of air navigation services, and for costs incurred by the Federal Aviation Administration (see 49 U.S.C. 1655(c)) to maintain air navigation facilities (as described in 49 U.S.C. 1348(b)) in a safe and efficient condition. See Airport and Airway Development Act Amendments of 1976, Pub. L. 94–353, Section 6(d), (e), 90 Stat. 873–874.

charges against claims similar to that of petitioner, it is not surprising that the lower courts have uniformly sustained the constitutionality of the companion taxes on the transportation of persons and property by air (26 U.S.C. 4261, 4271) as applied to state and local employees. In *State of Texas* v. *United States, supra,* upon which the decision below relied (Pet. App. A–7, A–10), the court held that the air passenger ticket tax could be constitutionally imposed upon state employees traveling on official business. In the court's view, the charge was "not a tax in the traditional sense, but instead is a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity" (72–2 U.S.T.C. at 86,131; citations omitted). As the court further stated, in terms particularly appropriate to this case (*ibid.*)—

> Nothing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. Even employees of the Federal Government must pay the air transportation charge. No logical reason exists why all users of the air transportation system should not pay their fair share of such costs.

Accord: *City of New York* v. *United States,* 394 F. Supp. 641 (S.D. N.Y.), affirmed, 538 F. 2d 308 (C.A.

2), certiorari denied, 429 U.S. 825; *State of California* v. *United States*, 77–2 U.S.T.C. ¶ 16,266, decided May 31, 1977 (E.D. Cal.).

3. Since the aircraft excise tax is a user charge, its application to petitioner's aircraft does not violate any implicit constitutional immunity the states and localities may have from federal taxation. Under the decisions of this Court discussed above, such user charges are not taxes subject to the constitutional limitations on the taxing powers of the federal and state governments. Thus, this case presents no occasion to consider the present status of the implied constitutional immunity of the states from federal taxation.[19]

[19] However, petitioner's assertion (Br. 41) that state tax immunity "remains alive and well" is questionable. The Court originally recognized such an immunity in *The Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private non-governmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. *Gerhardt* turned in part upon the fact that the tax on the employees was not deemed to be a tax on the governmental entity. Cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466. However, in *Gerhardt* the Court also reaffirmed the distinction drawn by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers. Although petitioner refers (Br. 15) to *McCulloch* as the origin of the principle that the states are immune from federal taxation, Chief Justice Marshall explicitly stated that the Article VI immunity of the federal government from state taxation was not reciprocal (see 4 Wheat. at 435–436).

Similarly, in *New York* v. *United States*, 326 U.S. 572, the Court upheld a federal tax upon the sale of mineral water by the State of New York. The case could have turned upon the distinction drawn in the earlier cases between governmental and private activities. However, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. While the case was decided without the adherence of a majority to any of the opinions supporting the judgment, under the various tests suggested in the plurality opinions, the aircraft use tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582–584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584–586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586–590, Stone C.J.). See also *National League of Cities* v. *Usery*, 426 U.S. 833, 843–844 and nn. 13, 14; *id.* at 863–864 (Brennan, J., dissenting); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485, 493 (1973). The aircraft use tax is nondiscriminatory under the first test and, as shown at pp. 23–26, *infra*, does not interfere with the sovereign functions of the states under the third test. Moreover, the withdrawal of the exemptions from the passenger tax for state and local employees, and the statement in the legislative history that the states and localities should pay their fair share of the use of airway facilities, shows that Congress intended such taxes to apply to the states (see p. 10, *supra*).

It is therefore not surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of tax immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that the immunity doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

4. Finally, the aircraft use tax as applied to petitioner's helicopter does not improperly impinge upon the exercise of its sovereign functions. If the federal

government subsidizes property or a facility, it may make that property or facility available on the condition that the user comply with reasonable conditions. When such property or facilities are made available to the states or their political subdivisions, the federal government may likewise impose such conditions without invading or diminishing the sovereignty of the states or local governments.

For example, the Court has upheld congressional restrictions on a city's use of electric power derived from facilities constructed on federal lands (*United States* v. *San Francisco,* 310 U.S. 16), on the use of federal funds for irrigation and reclamation projects (*Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 294–296), and on the activities of state officials administering federal funds supplied for highway construction (*Oklahoma* v. *Civil Service Commission,* 330 U.S. 127). Petitioner has no more right to free use of the federally-provided airport and airway facilities than it could, for example, use the postal service without stamping its mail.

While petitioner argues (Br. 54) that the tax is imposed upon "the performance of * * * [its] sovereign function of protecting the public safety," petitioner's sovereign functions are not the subject of any federal tax or charge. When petitioner undertakes to perform its sovereign functions by using a helicopter in the navigable airspace of the United States, it incurs the charges that Congress has imposed upon the use and enjoyment of navigational

facilities subsidized by the federal government and upon the use of navigable airspace controlled in extensive detail by the federal government. Since petitioner does not deny that it uses facilities furnished by the federal government, the reasonable charge imposed by the United States is not barred by the tax immunity doctrine.

Since the aircraft excise tax is a user charge, petitioner's reliance (Br. 52–53) upon *National League of Cities* v. *Usery,* 426 U.S. 833, is misplaced.[20] There, the Court held that the 1974 amendments to the Fair Labor Standards Act that extended the Act's minimum wage and maximum hour provisions to almost all employees of the states and their political subdivisions were unconstitutional.

The Court concluded that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by * * * [the Commerce Clause]" (426 U.S. at 852).

The nondiscriminatory charge for the use of federally-improved airport facilities is not comparable to the imposition of federal-wage-and-hour standards with respect to state and local government employ-

[20] In holding the user tax unconstitutional as applied to the states, the district court in *State of Georgia* v. *United States, supra,* relied upon *National League of Cities.* See J.S. App. A 1a–7a of our Jurisdictional Statement in that case (No. 77–16). We are serving a copy of this brief upon counsel for the appellee in *State of Georgia.*

ment. By imposing this user charge, Congress has not displaced the states' freedom to structure and conduct their governmental functions. It simply requires that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining the essential airport and airway facilities. Nothing in *National League of Cities* insulates the states from having to pay reasonable charges for services and facilities provided to them by the federal government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

M. CARR FERGUSON,
Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

ANN BELANGER DURNEY,
GILBERT S. ROTHENBERG,
Attorneys.

OCTOBER 1977.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4491 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, 84 Stat. 236, 243]. IMPOSITION OF TAX.

(a) *Imposition of tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus

(2)(A) [as amended by Sec. 305(a) of the Excise, Estate, and Gift Tax Adjustment Act of 1970, 84 Stat. 1836, 1846] in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) *In general.*—To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) *Cross reference.*—

For privilege of paying tax imposed by this section in installments, see section 6156.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

SEC. 4492 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, *supra*]. DEFINITIONS.

(a) *Taxable civil aircraft.*—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

(b) *Weight.*—For purposes of this subchapter, the term "maximum certificated takeoff weight"

means the maximum such weight contained in the type certificate or airworthiness certificate.

(c) *Other definitions.*—For purposes of this subchapter—

(1) *Year.*—The term "year" means the one-year period beginning on July 1.

(2) *Use.*—The term "use" means use in the navigable airspace of the United States.

(3) *Navigable airspace of the United States.*—The term "navigable airspace of the United States" has the definition given to such term by section 101(24) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1301 24)), except that such term does not include the navigable airspace of the Commonwealth of Puerto Rico or of any possession of the United States.

Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.):

§ 154.3–1 *Tax on use of civil aircraft.*

(a) *Purpose of this section.* In general, section 4491 of the Internal Revenue Code of 1954, as added by the Airport and Airway Revenue Act of 1970, imposes a tax upon the use, at any time during the taxable period, of any taxable civil aircraft in the navigable airspace of the United States. This tax is imposed upon such use during any taxable period beginning on July 1, 1970, and on each subsequent July 1 before July 1, 1980. This section sets forth rules as to the general applicability of the tax and also sets forth rules, as authorized by section 4493(a), to provide a method whereby certain lessees of tax-

able civil aircraft may elect to be liable for the tax. Further, this section provides administrative provisions relating to the payment of tax and the filing of tax returns.

(b) *Definitions.*—(1) *Use.* The term "use" means use in the navigable airspace of the United States, as defined in section 4492(c)(3), except that such term does not include use by a manufacturer, dealer, wholesaler, retailer, exporter, or importer of aircraft solely for demonstration, testing, or delivery purposes. Mere possession of a civil aircraft does not constitute "use."

(2) *Taxable civil aircraft.*—The term "taxable civil aircraft" means any engine powered aircraft which is either registered or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(a)) or which is owned by or for a U.S. person. Such term includes civil aircraft owned by the United States and State and local governments. Military aircraft and aircraft of the National Guard are not within the definition of taxable civil aircraft.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1977